

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

APARICIO GUTIERREZ-SANCHEZ , )

**Petitioner,** )

**v.** )

UNITED STATES OF AMERICA, )

**Defendant.** )

GERTNER, D.J.

**Docket No. 1:05-cv-12414-NG**

**MEMORANDUM AND ORDER RE: DISMISSAL**

April 28, 2009

**I. FACTS**

**A. The Underlying Criminal Case**

On August 1, 2002, Aparicio Gutierrez-Sanchez ("Gutierrez-Sanchez") and nine others were indicted for conspiracy to distribute, and to possess with intent to distribute, heroin, cocaine, and methylenedioxymetham-phetamine (MDMA).<sup>1</sup> On March 25, 2004, Petitioner pled guilty to the charges. The parties stipulated in the plea agreement that Petitioner was responsible for approximately 2.4 kilograms of heroin, 2.2 kilograms of cocaine, and approximately three kilograms of MDMA. Id. The parties also agreed that the government would seek a four-level leader/organizer adjustment pursuant to U.S. Sentencing Guidelines § 3B1.1 and further, that Petitioner reserved his right to oppose that request. Id.

At the sentencing hearing, Gutierrez-Sanchez's counsel exercised that option. He argued that the four-level upward adjustment was unwarranted because the suppliers of the heroin -- two citizens of the Dominican Republic known as "Punala" and "Morenito" -- were the actual leaders and organizers of the conspiracy. Id. at 4-5. He contended that instead of viewing the conspiracy

---

<sup>1</sup> The original criminal case is United States v. Gutierrez-Sanchez, No. 02-cr-10335-NG (D. Mass. 2002).

as a pyramid structure with Petitioner at the top, the conspiracy should be seen as a wheel, with Petitioner as the hub. Id. at 5. As such, he was a conduit rather than a leader or organizer. Id. The government countered that, regardless of the roles of “Punala” and “Morenito,” Gutierrez-Sanchez was a leader or organizer because he organized the sale of the drugs. Id. Gutierrez-Sanchez purchased the drugs, hired couriers, arranged sales of the drugs and oversaw the entire operation. Id.

The Court agreed, finding the leader and organizer enhancement applicable at the sentencing hearing. It sentenced Gutierrez-Sanchez to 188 months’ imprisonment, entering its judgment on June 25, 2004. See Judgment in a Criminal Case (docket no. 02-cr-10335-NG, document # 153).

#### **B. Procedural history**

Gutierrez-Sanchez did not appeal. His conviction became final on July 6, 2004, ten days after entry of judgment, when his appellate rights expired. See Fed. R. App. P. 4(b)(1)(A).

On March 14, 2005,<sup>2</sup> Gutierrez-Sanchez filed an initial habeas petition under 28 U.S.C. § 2255. See Pet. Writ Habeas Corpus (docket no. 05cv10499, document # 1). He claimed only a single ground for relief: that his counsel was constitutionally ineffective in failing to appeal his sentence. Had counsel appealed, he insisted, the Court of Appeals would have been in a position to review the sentence in light of Blakely v. Washington, 542 U.S. 296 (2004), which had been decided after the Court's sentencing hearing but before it entered judgment.

While the habeas petition was pending, on September 20, 2005, the petitioner moved to withdraw the petition. He noted that the “previous motion was improperly filed with lacking

---

<sup>2</sup> 252 days after the date of Gutierrez-Sanchez’s conviction became final.

evidence and information to support his claims.” Mot. Withdraw at 1 (docket no. 05-cv-10499-NG, document # 4). He added that through “diligence and research he has found new and more supporting grounds for his § 2255 motion and would only like the opportunity to exert them.” Id. at 2-3. Notably, Gutierrez-Sanchez requested that he be allowed to withdraw the petition “without prejudice in order to preserve his right's [sic] to refile within the next 60 days.” Id. at 1.

The government did not respond. This Court allowed the motion on October 17, 2005.

The plaintiff is pro se, lacks facility with the English language, and, in his Motion to Withdraw, did not admit his claims' lack of merit. Accordingly, I will grant his motion to withdraw and note further that plaintiff's initial Motion to Vacate/Set Aside/Correct Sentence (2255), once withdrawn, does not count as a 'first' petition for the purposes of the Anti-Terrorism and Effective Death Penalty Act's prohibition on 'second or successive' petitions. See 28 U.S.C. §§ 2244, 2255.

See Electronic Order (Oct. 17, 2005) (docket no. 05-cv-10499-NG).

On November 28, 2005,<sup>3</sup> Gutierrez-Sanchez filed a second habeas petition. See Mot. Under 28 USC § 2255 (document # 1). The government moved to dismiss, arguing both that the petition was untimely and that it lacked merit. See Mot. Dismiss (document # 4). On the timeliness issue, Gutierrez-Sanchez's response raised the question of equitable tolling, see Pet'r's Reply (document # 5). The Court ordered further briefing on the question. See Order for Add'l Briefing (Apr. 11, 2006) (document # 6).

After briefing, the Court concluded that the statute was tolled and denied the government's motion. See Order Denying Mot. Dismiss (docket # 10).

---

<sup>3</sup> Forty-two days after the motion to withdraw was allowed.

## **II. GUTIERREZ-SANCHEZ DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL**

To prevail on a claim of ineffective assistance of counsel, Gutierrez-Sanchez must demonstrate (1) that his counsel was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that Gutierrez-Sanchez was prejudiced by counsel's alleged mistakes. Strickland v. Washington, 466 U.S. 668, 686-87 (1984); Knight v. United States, 37 F.3d 769, 774 (1st Cir. 1994). The Strickland standard is a notoriously difficult one to meet. There is a strong presumption that counsel's conduct fell "within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; United States v. Soto-Alvarez, 958 F.2d 473, 478 (1st Cir. 1992).

### **A. Petitioner's Counsel Did Not Fail to Consult with Gutierrez-Sanchez or Provide Him with Discovery Materials.**

Rule 2(b) of The Rules Governing § 2255 Proceedings requires movants to "set forth in summary form the facts supporting each of the grounds" for relief. Rule 2(b). The First Circuit has held that a district court may summarily dismiss section 2255 "claims [that state] conclusions without specific and detailed supporting facts." United States v. Butt, 731 F.2d 75, 77 (1st Cir. 1984); accord Elliot v. Perez, 751 F.2d 1472, 1480 (5th Cir. 1985) ("[T]his court has consistently held that conclusory allegations unsupported by allegations of specific facts are insufficient to support constitutional claims."). Here, Gutierrez-Sanchez has not identified any issues that his counsel failed to discuss with him or any discovery materials that Gutierrez-Sanchez requested and did not receive. Gutierrez-Sanchez's counsel, Mr. Carmel-Montes, in contrast, has submitted an affidavit attesting that he consulted with Gutierrez-Sanchez on dozens of occasions, that he conferred with him about the pertinent facts and legal issues, and that he reviewed with Gutierrez-

Sanchez (or gave Gutierrez-Sanchez to review) pertinent discovery materials. In light of this affidavit, Gutierrez-Sanchez's failure to provide even minimal factual support for his claim warrants dismissal.

**B. Counsel Did Not Fail to Investigate or Dispute Gutierrez-Sanchez's Role in the Conspiracy.**

Rule 4(b) of The Rules Governing § 2255 Proceedings states that the judge "must dismiss" a § 2255 motion if "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that moving party is not entitled to relief." That is the case here. The record flatly contradicts Gutierrez-Sanchez's claim that his counsel advised him to stipulate to a leader/organizer enhancement in the plea agreement and failed to challenge the government's role-in-the-offense position at sentencing. On the contrary, the plea agreement reserved Gutierrez-Sanchez's right to oppose a leader/organizer enhancement; Mr. Carmel-Montes argued vigorously against the enhancement at sentencing.

The record also contradicts Gutierrez-Sanchez's argument that Mr. Carmel-Montes failed to investigate leads provided by Gutierrez-Sanchez that could have mitigated Gutierrez-Sanchez's role in the offense. Gutierrez-Sanchez has not identified any leads regarding his role in the offense that Mr. Carmel-Montes could have investigated but failed to do so. And apart from Gutierrez-Sanchez' claims, the sentencing record reflects detailed argument by counsel on the subject. Mr. Carmel-Montes (in conjunction with the government and the other defense counsel) presented the Court with a wealth of information relating to Gutierrez-Sanchez's role in the offense. Accordingly, this claim must be dismissed as well.

**C. Counsel Did Not Mislead Gutierrez-Sanchez about the Length of the Sentence He Would Receive.**

As set forth in Mr. Carmel-Montes' affidavit, he never advised Gutierrez-Sanchez that a downward departure motion based on substantial assistance was a "near certainty" or that Gutierrez-Sanchez's sentence would be a maximum of 120 months' imprisonment. He merely advised Gutierrez-Sanchez that attempting to provide substantial assistance was in Gutierrez-Sanchez's best interests in light of the weight of the evidence against him.

Significantly, at the Rule 11 hearing, Gutierrez-Sanchez affirmed that no promises had been made to him by anyone to induce him to plead guilty, other than the government's promises in the plea agreement. The plea agreement itself made clear that filing of a downward departure motion based on substantial assistance was entirely in the government's discretion. Moreover, at no point during the approximately three-month period between the Rule 11 hearing and sentencing did Gutierrez-Sanchez ever communicate to the government or the Court his expectation of a downward departure motion based on substantial assistance, even when he was invited to speak on his own behalf at sentencing. Under these circumstances, Gutierrez-Sanchez has provided the Court with no basis to reject the sworn statements of his counsel.

**WHEREFORE,** Gutierrez-Sanchez's section 2255 motion is hereby **DISMISSED.**

**SO ORDERED.**

**Date: April 28, 2009**

*/s/ Nancy Gertner*  
**NANCY GERTNER, U.S.D.C.**